

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR 21 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0255-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
RUBEN C. RIVERA, JR.,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR20080062

Honorable Robert Duber II, Judge

REVIEW GRANTED; RELIEF DENIED

Ruben C. Rivera, Jr.

Tucson
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Ruben Rivera, Jr. seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Rivera has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Rivera was found guilty of misconduct involving weapons, specifically being a prohibited possessor and knowingly possessing a deadly weapon. The trial court imposed an enhanced, presumptive, ten-year prison term. This court affirmed Rivera’s conviction and sentence on appeal. *State v. Rivera*, No. 2 CA-CR 2009-0015 (memorandum decision filed Oct. 28, 2009).

¶3 Rivera initiated a post-conviction relief proceeding, and counsel thereafter filed a notice stating he had reviewed the record and “was unable to find a meritorious issue . . . to justify the filing of a Petition” and requesting that Rivera be granted leave to file a pro se petition within thirty days. In his pro se petition, Rivera argued his trial counsel had been ineffective in failing “to conduct a ‘risk-benefit-analysis’ with [him] on the benefits of accepting the plea offer” the state had made before trial. And, citing *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), he maintained the trial court had failed to properly advise him pursuant to Rule 17.2, Ariz. R. Crim. P.

¶4 The trial court concluded Rivera had asserted a colorable claim of ineffective assistance of counsel and held an evidentiary hearing pursuant to Rule 32.8. After the hearing, the court denied relief, concluding Rivera had not been “lacking any information” and stating it did not believe Rivera “would have accepted the plea bargain had he had any other information.”

¶5 On review Rivera challenges the trial court’s conclusion that he had received adequate information to make an informed decision about the offered plea. He argues his testimony at the hearing established that counsel “never properly executed a ‘risk-benefit analysis,’” and he maintains trial counsel “‘clearly’ lied” to the court at the

hearing. Our review of the court’s factual findings “is limited to a determination of whether those findings are clearly erroneous”; we “view the facts in the light most favorable to sustaining the lower court’s ruling, and we must resolve all reasonable inferences against the defendant.” *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). When “the trial court’s ruling is based on substantial evidence, this court will affirm.” *Id.* And, “[e]vidence is not insubstantial merely because testimony is conflicting or reasonable persons may draw different conclusions from the evidence.” *Id.*; *see also State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988) (trial court sole arbiter of witness credibility in post-conviction proceeding).

¶6 “To prove ineffective assistance of trial counsel, a petitioner must show both deficient performance and prejudice.” *Donald*, 198 Ariz. 406, ¶ 15, 10 P.3d at 1200; *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant may show deficient performance during plea negotiations by proving counsel gave him erroneous advice or “failed to give information necessary to allow [the defendant] to make an informed decision whether to accept the plea.” *Donald*, 198 Ariz. 406, ¶ 16, 10 P.3d at 1200. Under *Donald*, “[t]o establish prejudice in the rejection of a plea offer, a defendant must show ‘a reasonable probability that, absent his attorney’s deficient advice, he would have accepted the plea offer’ and declined to go forward to trial.” *Id.* ¶ 20, *quoting People v. Curry*, 687 N.E.2d 877, 888 (Ill. 1997).

¶7 Rivera had the burden of proving his factual allegations by a preponderance of the evidence. *See Ariz. R. Crim. P. 32.8(c)*. And, the trial court was “the sole arbit[er] of the credibility of witnesses” at the evidentiary hearing. *Fritz*, 157 Ariz. at 141, 755

P.2d at 446; *see also Sasak*, 178 Ariz. at 186, 871 P.2d at 733 (“It is the duty of the trial court to resolve any conflicts in the evidence.”). The court’s factual determinations were supported by evidence presented at the hearing, including trial counsel’s testimony that he had explained both the benefits of the plea and the risks at trial to Rivera. Counsel further stated that, although he had no “independent recollection” of having told Rivera he would “have a right to challenge what happened in the proceedings” in a Rule 32 petition, he was sure he had done so because he “always” did. We will not, as Rivera essentially proposes on review, reweigh the evidence presented. *Cf. State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997) (reviewing court does not reweigh trial evidence). We find no abuse of discretion in the court’s denial of relief on this claim.

¶8 As he did below, Rivera also contends the trial court failed to properly advise him pursuant to Rule 17.2. He relies on *Donald* not only for his claim of ineffective assistance of counsel, but for the further proposition that a trial court is *required* to conduct a *Donald* hearing and advise a defendant in relation to his or her rejection of a plea agreement, and he maintains he would have accepted the offered plea had the court advised him in a manner consistent with Rule 17.2. But Rule 17.2 applies when a defendant “accept[s] a plea of guilty or no contest” and, ultimately, Rivera did not plead guilty. He cites no authority to support his assertion that the court was required to advise him in accordance with that rule when he rejected an offered plea. *See Ariz. R. Crim. P. 32.9(c)(1)* (petition for review shall contain “[t]he reasons why the petition should be granted”). Likewise, Rivera cites no authority to suggest that *Donald* imposes any duty on a trial court independent of the court’s resolution of a post-conviction claim

of ineffective assistance of counsel. 198 Ariz. 406, ¶ 17, 10 P.3d at 1200 (*Donald* hearing required when defendant “present[s] more than a conclusory assertion that counsel failed to adequately communicate the plea offer or the consequences of conviction.”); *see also* Ariz. R. Crim. P. 32.9(c)(1). And in this case, consistent with *Donald*, the court held a hearing to consider Rivera’s claim of ineffective assistance of counsel in relation to his rejection of the plea offer although, as noted above, it ultimately rejected that claim.

¶9 For the foregoing reasons, although we grant the petition for review, relief is denied.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge